

11. REGULATORY FRAMEWORK

This section provides insight into the regulations protecting sensitive resources within Ballona Wetlands, and briefly identifies the regulatory permits that may be necessary for future implementation of the restoration project.

11.1 FEDERAL ENDANGERED SPECIES ACT

Both the NOAA Fisheries and the USFWS share responsibility for administration of the Federal Endangered Species Act (FESA). The FESA protects listed wildlife species from harm or ‘take’. The term ‘take’ is broadly defined as ‘harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct’. An activity is defined as a ‘take’ even if it is unintentional or accidental. Individuals planning to conduct any activity resulting in the ‘take’ of an endangered or threatened species, whether or not deliberate, must possess an Incidental Take Authorization Permit to perform that activity. This permit would consist of a Biological Opinion and Incidental Take Statement which must establish that the proposed ‘take’ would not jeopardize the continued existence of the endangered or threatened species.

Issuance of an Incidental Take Authorization may occur either under Section 10(a) of the FESA for projects that have no other federal involvement, or under Section 7 of the FESA for projects that require funding or permits from other federal agencies. Since the proposed Ballona Wetlands Restoration Project would likely require a Clean Water Act Section 404 permit (Section 11.2) from the USACE, Section 7 consultation between the USACE and the USFWS and/or NOAA Fisheries would be required for any identified federally-listed endangered and threatened species.

11.2 CLEAN WATER ACT SECTION 404

The USACE is responsible under Section 404 of the Clean Water Act (CWA) for regulating discharges of fill or dredged material into waters of the United States. Waters of the U.S. and their lateral limits are defined in 33 CFR (Code of Federal Regulations) Part 328.3(a) and include streams that are tributary to navigable waters and adjacent wetlands. Wetlands that are not adjacent to waters of the U.S. are termed ‘isolated wetlands’ and may be subject to USACE jurisdiction if they have a hydrological connection to waters of the U.S. In general, either a Nationwide or Individual Section 404 permit must be obtained before placing fill or dredging in designated wetlands or other waters of the U.S. Nationwide permits are authorized for certain categories of projects that are deemed to have minimal impacts on aquatic resources. NEPA review is required for each Nationwide permit, although once established, project specific NEPA compliance is not required for subsequent actions.

The Ballona Wetlands Restoration Project will likely require a Section 404 permit. The type of permit required, Nationwide or Individual, depends on the amount of acreage involved and the end purpose of any proposed fill.

11.3 NATIONAL HISTORIC PRESERVATION ACT SECTION 106

Section 106 of the National Historic Preservation Act (NHPA) is triggered by federal agency involvement (e.g. USACE Section 404 permit, federal funding source, or related actions) and requires federal agencies to consider the effects of their actions on historic properties, and provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on federal projects prior to implementation. The regulations implementing Section 106 are promulgated by the Secretary of the Interior, as codified in Title 36 of the Code of Federal Regulations (CFR) Part 800 (as amended).

Federal agencies are responsible for initiating Section 106 consultation with tribal organizations and other interested individuals or parties. The State Historic Preservation Officer (SHPO) co-ordinates the State's historic preservation program and consults with agencies during Section 106 review.

To successfully complete the Section 106 process, federal agencies must:

- determine if Section 106 of the NHPA applies to a given project and, if so, initiate the review;
- gather information to decide which properties in the project area are listed in the National Register of Historic Places (NRHP), or may be eligible for listing;
- determine how historic properties might be affected;
- explore alternatives to avoid or reduce harm to historic properties; and
- reach agreement with the SHPO, Indian tribes, and other stakeholders (the Native American Heritage Commission, local historical preservation groups, and possibly the ACHP) on measures to deal with any adverse effects.

In order to be considered during Section 106 review, a property must either be already listed in the NRHP or be eligible for listing. A property is considered eligible when it meets specific criteria established by the National Park Service. During the Section 106 process, the federal agency evaluates properties against those criteria and seeks the consensus of the SHPO, Indian tribes, and other interested parties regarding eligibility. Cultural and archaeological resources are typically considered eligible for inclusion in the NRHP due to links with important persons, places or events in the past, as examples of artistic achievement, or because of the information they contain or may be likely to yield.

Determining the NRHP eligibility of a site or district is guided by the specific legal context of the site's significance, as set out in 36 CFR 60.4. The NHPA authorizes the Secretary of the Interior to maintain and expand a national register of districts, sites, buildings, structures, and objects of significance in American history, architecture, archaeology, engineering and culture. A property may be listed in the NRHP if it meets the criteria for evaluation defined in 36 CFR 60.4:

The quality of significance in American history, architecture, archaeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:

- that are associated with events that have made a significant contribution to the broad patterns of our history; or
- that are associated with the lives of persons significant in our past; or
- that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- that have yielded, or may be likely to yield, information important in prehistory or history.

Intensity of impacts to cultural resources is determined based on the importance of the information or associations the resources contain, and their integrity. When historic properties will be adversely affected by a federal action, the Section 106 process usually concludes with a legally binding agreement between the federal agency, the SHPO, and consulting parties that establishes how the federal agency will mitigate for adverse effects.

The project area is within the Ballona Lagoon Archaeological District, a National Register-eligible district that includes large portions of Ballona Wetlands and adjacent bluff tops. Assessment of the Ballona Wetlands Restoration Project for compliance with Section 106 would be required in conjunction with USACE permit issuance under Section 404 of the CWA.

11.4 FISH AND WILDLIFE CO-ORDINATION ACT

The Fish and Wildlife Co-ordination Act (16 USC Sections 661-667e, March 10, 1934, as amended 1946, 1958, 1978 and 1995) requires federal agencies to consult with the USFWS, NOAA Fisheries, and CDFG before they undertake or approve projects that control or modify surface water. The consultation is intended to prevent the loss of or damage to fish and wildlife in connection with water projects and to develop and improve these resources. Compliance with the Fish and Wildlife Co-ordination Act is incorporated into a project's NEPA process and is therefore relevant to the proposed project only after NEPA compliance has been triggered. Most USFWS comments on applications for permits under Section 404 of the CWA or Section 10 of the Rivers and Harbors Act are conveyed to the USACE through the consultation process required by this co-ordination act. However, although the USACE must consult with USFWS, it is not required to implement USFWS recommendations.

11.5 MIGRATORY BIRD TREATY ACT AND BALD AND GOLDEN EAGLE PROTECTION ACT

The Migratory Bird Treaty Act (16 USC 703–711) prohibits the take of any migratory bird or any part, nest, or eggs of any such bird. Under the act, take is defined as pursuing, hunting, shooting, capturing, collecting, or killing, or attempting to do so. Additionally, Executive Order (EO) 13186 (January 11, 2001) requires that any project with federal involvement address impacts of federal actions on migratory birds with the purpose of promoting conservation of migratory bird populations. The EO requires federal agencies to work with the USFWS to develop a memorandum of understanding. The Bald and Golden Eagle Protection Act (16 USC

668) prohibits the take or commerce of any part of these species. The USFWS reviews actions that might affect these species.

11.6 CALIFORNIA ENDANGERED SPECIES ACT

The CDFG has jurisdiction over threatened or endangered species that are formally listed by the State under the California Endangered Species Act (CESA). The CESA is similar to the FESA both in process and substance, with the intention of providing additional protection to threatened and endangered species in California. The CESA does not supersede the FESA, but operates in conjunction with it. Species may be listed as threatened or endangered under both acts (in which case the provisions of both state and federal laws apply) or under only one act. The California endangered species laws prohibit the take of any plant listed as endangered, threatened, or rare, even when incidental take is permitted under FESA. For example, species such as the clapper rail are fully protected from incidental take under CESA.

As landowner, CDFG is charged with ensuring that interim and long-term restoration actions comply with CESA, although CDFG does not need to issue itself a CESA permit.

11.7 FULLY PROTECTED SPECIES AND SPECIES OF SPECIAL CONCERN

CDFG maintains a list of Fully Protected Species and an informal list of Species of Special Concern. Fully protected species cannot be harmed or possessed at any time, and many of these species are also threatened or endangered.

Species of Special Concern are broadly defined as wildlife species that are of concern to the CDFG because of population declines and restricted distributions, and/or they are associated with habitats that are declining in California. Some of these species are inventoried in the CNDDDB regardless of their legal status. Impacts to species of special concern may be considered significant under CEQA.

11.8 CALIFORNIA FISH AND GAME CODE SECTION 3503

According to Section 3503.5 of the California Fish and Game Code (Protection of Nesting Birds and Raptors), it is unlawful to take, possess, or destroy any birds of prey (i.e. species in the orders Falconiformes and Strigiformes) or to take, possess, or destroy any nest or eggs of such birds. Active nests of all other birds (except English sparrow and European starling) are similarly protected under Section 3503 of the California Fish and Game Code, as well as birds designated in the International MBTA under Section 3513 of the California Fish and Game Code. Disturbance that causes nest abandonment and/or loss of reproductive effort is considered 'take' by CDFG. This statute does not provide for the issuance of an incidental take permit.

11.9 CALIFORNIA FISH AND GAME CODE SECTION 1602

All diversions, obstructions, or changes to the natural flow, or bed, channel, or bank of any river, stream, or lake in California that supports wildlife resources are subject to regulation by CDFG, pursuant to Section

1602 of the California Fish and Game Code. Section 1602 states that it is unlawful for any person to substantially divert or obstruct the natural flow, or substantially change the bed, channel, or bank of any river, stream, or lake designated by CDFG, or to use any material from the streambeds, without first notifying CDFG of such activity. The regulatory definition of a stream is a body of water that flows at least periodically or intermittently through a bed or channel that has banks and supports fish or other aquatic life. This includes watercourses with a surface or sub-surface flow that supports or has supported riparian vegetation. CDFG's jurisdiction within altered or artificial waterways is based on the value of those waterways to fish and wildlife.

As landowner, CDFG is charged with ensuring that interim and long-term restoration actions comply with the Fish and Game Code, although CDFG does not need to issue itself a Section 1602 permit.

11.10 CALIFORNIA NATIVE PLANT SOCIETY

The California Native Plant Society (CNPS) *Inventory of Rare and Endangered Plants of California* (6th Edition, 2001) includes five lists for categorizing plant species of concern:

- List 1A – Plants presumed extinct in California
- List 1B – Plants rare, threatened, or endangered in California and elsewhere
- List 2 – Plants rare, threatened, or endangered in California but more common elsewhere
- List 3 – Plants about which we need more information – a review list
- List 4 – Plants of limited distribution

The plants listed on CNPS lists 1B and 2 are considered rare, endangered, and/or threatened plants pursuant to Section 15370 of the CEQA. The plants on these lists often meet the definitions under the CESA and may be eligible for state listing.

11.11 CLEAN WATER ACT SECTION 401

Section 401 of the federal CWA specifies that states must certify that any activity subject to a permit issued by a federal agency, such as the USACE, meets all state water quality standards. The Los Angeles Regional Water Quality Control Board (RWQCB) is regionally responsible for taking certification actions for activities subject to any permit issued by the USACE pursuant to Section 404 (or for any other USACE permit, such as permits issued pursuant to Section 10 of the Rivers and Harbors Act of 1899). Actions may include issuance of a 401 certification noting that the activity subject to the federal permit complies with state water quality standards, issuance of a conditional 401 certification, and denial of 401 certification. In instances where the 401 certification is denied, the associated federal permit is also deemed denied.

The Ballona Wetlands Restoration Project will require consultation with the RWQCB pursuant to Section 401.

11.12 PORTER-COLOGNE WATER QUALITY CONTROL ACT

Projects that affect wetlands or waters must also meet waste discharge requirements (WDRs) of the RWQCB under California's Porter-Cologne Water Quality Control Act. Under this Act, the RWQCB regulates the 'discharge of waste' to 'waters of the State'. Both of the terms 'discharge of waste' and 'waters of the State' are broadly defined in Porter-Cologne, such that discharges of waste include fill, any material resulting from human activity, or any other 'discharge' that may directly or indirectly impact 'waters of the State.' It is important to note that, while USACE Section 404 permits and RWQCB 401 certifications are required when the activity results in fill or discharge directly below the ordinary high water line of waters of the United States, any activity that results or may result in a discharge that directly or indirectly impacts waters of the State or the beneficial uses of those waters are subject to WDRs.

WDRs may be applied to the Ballona Wetlands Restoration Project depending on the ultimate project design and use of fill materials.

11.13 CALIFORNIA COASTAL ACT

The California Coastal Commission regulates the use of land and water in the coastal zone in accordance with the Coastal Act (Division 20 of the Public Resources Code). The Coastal Act includes specific policies that address issues such as shoreline public access and recreation, lower cost visitor accommodations, terrestrial and marine habitat protection, visual resources, landform alteration, agricultural lands, commercial fisheries, industrial uses, water quality, offshore oil and gas development, transportation, development design, power plants, ports, and public works.

Development activities in the coastal zone typically require a coastal development permit from the California Coastal Commission, or in instances where local government has developed an approved Local Coastal Program (LCP), from the local governing agency. Areas A, B, and C of the Ballona Wetlands Restoration Project are all located within the coastal zone, and thus are within the jurisdiction of the California Coastal Commission. No LCP currently exists providing coverage of the project area, while there is, for instance, an LCP for nearby Marina Del Rey. Therefore, a Coastal Development Permit would be issued by the California Coastal Commission following their review.

11.14 LOCAL GOVERNMENT

The CDFG, as a public agency, receives intergovernmental immunity under California Government Code Sections 53090 et seq. Such immunity exempts the extraterritorial lands owned by CDFG from the planning and building laws of any other city or county in which those lands are located. Thus, the zoning and building codes, general plans, specific plans, and other planning and building policies of Los Angeles County or the City of Los Angeles would not apply to the Ballona Wetlands Restoration Project.